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No. 98 - 1512

In the
Supreme Court of the United States
October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,
SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

BRIEF OF *AMICI CURIÆ* AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP; AMERICAN SENIORS HOUSING ASSOCIATION; COMMUNITY HOUSING IMPROVEMENT PROGRAM; HUDSON COUNTY BOARD OF REALTORS; HUDSON COUNTY TAXPAYERS ASSOCIATION; ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION; MAINE CONSERVATION RIGHTS INSTITUTE; METROPOLITAN REAL ESTATE INVESTORS ASSOCIATION; NATIONAL APARTMENT ASSOCIATION; NATIONAL MULTI HOUSING COUNCIL; NEW HAMPSHIRE PROPERTY OWNERS ASSOCIATION; PROPERTY OWNING WOMEN; PROPERTY RIGHTS FOUNDATION OF AMERICA; RENT STABILIZATION ASSOCIATION; AND SMALL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the ends-means nexus test of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), be used to determine whether a rent control law effects a regulatory taking as applied to specific real property?

2. Is a claim for an as-applied regulatory taking properly set forth by factual allegations which, if proven at trial, would show that the application of a rent control ordinance has "no relationship at all" to its admittedly legitimate police power objectives?

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INTEREST OF *AMICI CURIÆ*[1]

The *Amicus* organizations[2] seek to bring to the Court's

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

2 American Association for Small Property Ownership is a national grassroots organization of small property owners. American Association for Small Property Owners' goal is to restore common sense and equity to

federal, state and local regulations, and to tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

American Seniors Housing Association is an affiliate of the National Multi Housing Council that represents the interests of the nation's largest firms involved in seniors housing. American Seniors Housing Association consists of the principal officers of these firms. The members of the American Seniors Housing Association are engaged in all aspects of the development and operation of seniors housing, including ownership, construction, management, and finance.

Community Housing Improvement Program, Inc., is a not-for-profit trade association representing more than 2000 owners of rent-controlled and rent-stabilized apartment buildings in New York City. The organization was established in 1966 to inform and represent its members on issues of rent regulation and apartment management.

Hudson County Board of Realtors, Inc., is a New Jersey not-for-profit corporation which currently has 1797 members throughout Hudson County, New Jersey. The goals of the organization are, *inter alia*, to further the interest of home and other real estate property ownership and to unite those engaged in the real estate profession.

Hudson County Taxpayers Association is an organization of property owners in Hudson County, New Jersey. It has approximately 850 members who are concerned with the effect of government regulation, in particular rent control and tax policy, on property values of small property owners.

Illinois Rental Property Owners Association is an organization of rental property owners, investors, and managers in Illinois. It unites numerous member organizations from around the state, comprising approximately 2000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Maine Conservation Rights Institute is a non-profit organization committed to the application of innovative conservation methods within the context of the private property and free market systems. It has approximately 900 associates. Maine Conservation Rights Institute's mission, in part, is to educate the public as to their constitutional property rights.

Metropolitan Real Estate Investors Association is a New Jersey not-for-profit member-sponsored real estate organization incorporated in

1987. Metropolitan Real Estate Investors Association includes approximately 125 real estate investors, who are housing providers and rehabilitators of small unit rental housing in the New York metropolitan area, primarily in northern New Jersey.

National Apartment Association is the largest national federation of state and local associations of apartment industry professionals including developers, owners, investors, and property managers. National Apartment Association is comprised of 150 affiliates and represents more than 26,000 professionals who own and/or manage more than 3.3 million apartments.

National Multi Housing Council is a non-profit association representing some of the apartment industry's largest firms. National Multi Housing Council consists of over 800 members, who are the principal officers of these firms. The members of the National Multi Housing Council are engaged in all aspects of the development and operation of multi-family housing, including ownership, construction, management, and finance.

New Hampshire Property Owners Association is an all-volunteer New Hampshire trade association for owners and managers of rental real estate. New Hampshire Property Owners Association has seven city chapters and over 700 member landlords. Its mission, in part, is to educate small property owners about management skills and applicable laws.

Property Owning Women is a non-profit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

Property Rights Foundation of America is a tax-exempt incorporated association with 1500 members. It represents private property owners nationally. Among its objectives is to promote the fundamental constitutional right to own and use private property.

Rent Stabilization Association is a New York not-for-profit corporation. The Rent Stabilization Association is a trade association with a membership of approximately 25,000 owners and managers of rent-regulated residential real property in New York City. The mission of the Rent Stabilization Association includes advocating for the property interests of its membership.

Small Property Owners Association is a nonprofit organization which began in Cambridge, Massachusetts, 1987, and includes 3,000 members throughout Massachusetts. The Small Property Owners

attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

If the decision below is not reversed, property owners will not be able to use scientific evidence or factual data to challenge regulatory takings. If the decision below is allowed to stand, different standards of review of regulatory takings under the Fifth Amendment to the United States Constitution will apply in various states and the federal courts. Rent control is a substantial regulation of property that has substantial popular political appeal. Under the decision below, property owners will be left without recourse to preserve the investment value of their property and challenge the expansion of rent control if they are prohibited from presenting data that demonstrate the lack of nexus between a regulation's intent and its result. These issues are of significance to the members of the *Amicus* organizations as well as to property owners generally. *Amici Curiæ* believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of certiorari.

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Santa Monica Beach, Ltd.

Association's goal is to preserve the 1994 Massachusetts referendum repeal of rent control, advance the rights and interests of small, family-business rental owners, and educate the public on the contribution of small property ownership to neighborhood stability and affordable housing.

SUMMARY OF ARGUMENT

The California Supreme Court erroneously concluded that it could ignore demographic data demonstrating that the Santa Monica Rent Control Law did not advance its stated purpose. This Court should grant the petition for certiorari because the decision below interpreting the applicable standard for regulatory takings as enunciated in *Nollan v. California Coastal Commission,* 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 386 (1994), deprives those standards of meaning and conflicts with the decisions of other state and federal courts. The decision below also directly repudiates a decision of this Court, *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). Moreover, the issue before this Court is not unique. The long-term adverse consequences of rent control—the decrease in affordable housing in affected jurisdictions and continuing housing shortages—predicted by standard economic theory have been borne out by studies of other jurisdictions. Under the *Nollan* standard, property owners should be able to demonstrate through demographic data that rent control, rather than advancing its stated intent, in fact hinders it.

ARGUMENT

I. THE DECISION OF THE CALIFORNIA SUPREME COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS AND WITH OPINIONS OF THIS COURT BY REFUSING TO CONSIDER EVIDENCE OF THE EFFECT OF RENT CONTROL ON ACHIEVING THE CITY'S STATED GOALS AND CONTINUING THEIR EFFECT BEYOND ANY INITIAL EMERGENCY.

Amici contend that property owner Santa Monica Beach, Ltd. ("SMB") should be permitted to demonstrate at trial that the Santa Monica Rent Control Law, SANTA MONICA, CAL.

CHARTER Article XVIII, Section 1800, violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment). The Santa Monica Rent Control Board ("the Board") in its demurrer to SMB's complaint has made no proffer that there is a current rent emergency unrelated to the imposition of rent control or that rent control in fact advances any substantial state interest.

Pursuant to Supreme Court Rule 10 (b), certiorari is appropriate in this case as the decision of the California Supreme Court below conflicts with those of another state court of last resort and of a United States Court of Appeals. This Court, in *Yee v. City of Escondido,* 503 U.S. 519, 537–38 (1992), declined to address the issue of rent control as a regulatory taking, in part because at that time there was no conflict among lower courts on the issue. At this time, however, there are conflicting rulings on whether a general rent control scheme that fails to advance its stated goals constitutes a regulatory taking under the standards of *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987) ("*Nollan*"), and *Dolan v. City of Tigard,* 512 U.S. 374, 386 (1994) ("*Dolan*").

As suggested in *Yee, supra,* 483 U.S. at 538, certiorari is now appropriate as there is a conflict in this case "between two courts whose jurisdiction includes California, the State with the largest population and one with a relatively high percentage of the Nation's [rent-controlled residential properties]. Forum shopping is thus of particular concern." *Id.* at 538. In this case, the decision of the California Supreme Court below, *Santa Monica Beach, Ltd. v. Superior Court,* 968 P.2d 993, 81 Cal. Rptr. 93 (1999), by interpreting the *Nollan* and *Dolan* standards as a "rational relation test," App. A-14–16, A-21–22, directly conflicts with the opinion of the Court of Appeals for the Ninth Circuit in *Richardson v. City of Honolulu,* 124 F.3d 1150,

1165–66 (9th Cir. 1997). The Court of Appeals in *Richardson* held an ordinance that "regulate[d] the use of the lessors' property in a manner that d[id] not substantially further the goal of creating affordable housing," *id.*, constitutes a regulatory taking.

The decision below also conflicts with the opinion of the New York State Court of Appeals, the highest court of another large state with a large percentage of the Nation's rent-controlled housing, in *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 392–93, 643 N.E.2d 479, 482–83, 618 N.Y.S.2d 857, 860–61 (1994), *cert. denied*, 514 U.S. 1109 (1995). In *Manocherian*, the Court of Appeals, applying the *Nollan* and *Dolan* substantial advancement standard, found a provision of the New York City Rent Stabilization Law ("RSL") to be a regulatory taking because the provision "contradict[ed] two key goals of the RSL, to wit, occupant protection and eventual market redemption." *Id.* at 84 N.Y.2d at 394, 643 N.E.2d at 483, 618 N.Y.S.2d at 861. Thus, in that case, the Court of Appeals analyzed the provision to determine whether it actually advanced the state's enunciated goals, as required under *Nollan* and *Dolan*, while the majority in the decision below was satisfied with the enunciation of lofty goals and declined to address the practical effects of the legislation. App. A-15–18.

Another reason that this Court, in *Yee, supra*, 503 U.S. at 538, declined to consider whether rent control effects a regulatory taking was that the issue had not been fully litigated below, depriving the Court of the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. In this case, however, the Court has the benefit of three lower court determinations directly on point, as well as three thoughtful dissenting opinions and a concurrence in the decision of the state court of last resort.

In addition, certiorari is warranted pursuant to Supreme Court Rule 10 (c) as the decision below conflicts with relevant decisions of this Court in *Nollan, Dolan,* and *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). While the opinion below purports to follow *Nollan* and *Dolan,* App. A-19–22 (while thoroughly distorting their meaning, as discussed in the dissenting opinions of Justices Baxter, Chin, and Brown), the majority below explicitly repudiates *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). App. A-23.[3] Justice Baxter's dissent ably discusses the continuing validity of *Chastleton,* App. A-71–72. In dismissing *Chastleton* as "a *Lochner*-era case the validity of which is questionable at best," App. A-23, the majority below ignores the fact that *Chastleton* was clearly decided on Fifth Amendment Takings Clause grounds, not as a substantive due process claim. *Chastleton, supra,* 264 U.S. at 546.

In *Chastleton,* which concerned the continuation of rent control initially imposed during the First World War, this Court stated that "the emergency that justified interference with ordinarily existing private rights [during the First World War and its immediate aftermath] had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution." *Id.* at 546. The Court went on to hold that, if all that remained of the wartime emergency was inflated prices, "that is not, in itself, a justification of the [rent control] act." *Id.* at 548.

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3 Several state courts have previously held that the emergency requirement for adoption of rent control is no longer applicable. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 129 (Cal. 1976); *Westchester W. No. 2 Ptsp. v. Montgomery County,* 348 A.2d 856 (Md. 1975); *Hutton Park Gardens v. Town Council of W. Orange,* 68 N.J. 543, 350 A.2d 1 (1975). All of these cases were decided before *Nollan* and *Dolan.*

Since *Chastleton*, this Court has not subsequently addressed the doctrine of emergency as justification for rent control outside of the context of a war and its immediate aftermath.[4] Nevertheless, *Chastleton* contains clear, definitive language invalidating rent control legislation that continues beyond the emergency that supported its enactment. *Chastleton* was authored by Justice Holmes, the same justice who had two years earlier written *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the foundation of modern regulatory takings jurisprudence.[5] *Chastleton* thus clearly presages and falls within the standards enunciated in *Nollan* and *Dolan*, because ameliorating temporary high inflation in housing prices caused by war-time disruptions is a legitimate public interest which may, in certain circumstances, be advanced, in the short-term only, by rent control. *See* Richard Arnott, *Rent Control, in* 3

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4 *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). *See also Woods, supra*, 333 U.S. at 146–47 (Jackson, J., concurring) ("Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect the conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care. . . . I cannot accept the argument that war powers last as long as the effects and consequences of war for if so they are permanent . . . .").

5 It should be noted, moreover, that Justice Holmes had presciently dissented in *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting). Moreover, this Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938)—the case considered by commentators to mark the demise of *Lochner*, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7 at 582 (2d ed. 1988)—relied upon *Chastleton* for the proposition that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Carolene Prods. Co., supra*, 304 U.S. at 153.

NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 305, 307 (Peter Newman ed., 1998). *Chastleton* was relied upon by this Court as recently as *Baker v. Carr*, 369 U.S. 186, 214 (1962) (per Brennan, J.), quoting *Chastleton* for the proposition that "political" questions are justiciable.[6]

Assuming that the emergency basis for the Santa Monica Rent Control Law was a marked inflation in rents, the temporary effect of inflation in the late 1970s should have dissipated by now.[7] If, at this point, all that is left is the lingering effects on the base rent of the initial rise in prices, then the emergency has passed in accordance with *Chastleton, supra*, 264 U.S. at 547–48 ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."). Moreover, to the extent that rent control may reduce rents in Santa Monica below market rent for comparable facilities in neighboring towns, that lower rent will result in increased demand for housing in Santa Monica and gradual deterioration and diminution of the Santa Monica rental housing stock, exacerbating rather than relieving the problem,

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6 "'[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.'" *Baker, supra*, 369 U.S. at 214 (quoting *Chastleton, supra*, 264 U.S. 547–48).

7 It should be noted that the rental emergency caused by the First World War was determined to be over within four years of the signing of the armistice on November 11, 1918. *Chastleton, supra*, 264 U.S. at 546.

as discussed below.[8] If a situation that caused a regulation to be passed continues in effect because of the regulation itself, it ceases to be an "emergency," therefore, invalidating further application of the regulation. *See Chastleton, supra,* 264 U.S. at 546; R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* 21 SW. U. L. REV. 1019, 1032 (1992) ("Courts must employ heightened scrutiny to determine that a specific ordinance, as administered, substantially contributes to relieving the problems stemming from the emergency.").

In this case, the Santa Monica Rent Control Law includes in its preamble a *pro forma* recitation that "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitutes a serious housing problem . . . ."[9] Yet the Board has not proffered any

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8 *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 32 (2d ed. 1997); N. GREGORY MANKIEW, *PRINCIPLES OF ECONOMICS* 115–17 (1998); JOSEPH E. STIGLITZ, *ECONOMICS* 114–16 (2d ed. 1993); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation,* 54 BROOK. L. REV. 741, 763, 765–67 (1988) (rent control linked to decrease in quality and quantity of rental housing); Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 U.C.L.A. L. REV. 399, 432–33, 434, 440 (1988); R.S. Radford, *Why Rent Control is a Regulatory Taking?* 6 FORDHAM ENVTL. L.J. 755, 769–70 (1995); R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* 21 SW. U. L. REV. 1019, 1034–35, 1039–40 (1992).

9 Many rent control ordinances contain a relatively general declaration of emergency, most often referring to a perceived shortage of rental housing. Radford, *supra,* 21 SW. U. L. REV. at 1033 & nn. 94–96. This rote recitation of an "emergency" basis is not adequate to overcome a takings claim. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1026 (1992) ("A fortiori the legislature's recitation of a . . . justification cannot be the basis for departure from our categorical rule that

defenses that would rebut SMB's allegations or indicate that the Santa Monica rent control program in any way alleviates a shortage of rental housing units as required under *Nollan* and *Dolan.* Certainly, the Board cannot satisfy *Chastleton*'s requirement that any rental housing emergency declared in 1979 continue to this date for a non-self-perpetuating reason. The decision of the California Supreme Court below explicitly contradicts the continuing mandate of this Court in *Chastleton* and therefore merits review and correction.

II. THE EXPERIENCE OF OTHER RENT-CONTROLLED JURISDICTIONS IS SIMILAR TO THAT OF SANTA MONICA AND DEMONSTRATES THAT RENT CONTROL REDUCES THE NUMBER OF RENTAL UNITS AND OF POOR, MINORITY, AND STUDENT TENANTS.

The experience of Santa Monica is by no means unique. At least five states and the District of Columbia currently permit local rent control.[10] Given the seductive lure of reducing housing costs without direct and transparent costs to the

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total regulatory takings must be compensated. If it were, departure would virtually always be allowed. ").

10 California, Maine, Maryland, New Jersey, New York, and the District of Columbia. *See* Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHI.-KENT L. REV. 931, 931 (1991). In 1994, after a successful referendum, Massachusetts eliminated rent control. *See* MASS. G.L. ch. 40P; 1994 Mass. Stat. ch. 282. *But see infra* note 11. In 1995, Maine deleted its rent control enabling statute, but permitted existing municipal rent control ordinances to continue and enunciated a legislative intent "to permit municipalities to continue to adopt and enforce rent control ordinances under home rule authority." 1995 Me. Laws ch. 194. The City of Westbrook, Maine, continues to operate a rent control ordinance, WESTBROOK, ME., CODE §§ 21-15 *et seq.*, which is currently the subject of litigation. *Ham Westbrook, L.L.C. v. Inhabitants of Westbrook,* Dock. No. AP-98-111 (Cumberland, Me., Super. Ct.).

government, municipalities will continue to have incentives to impose rent control even without state authorization. *See, e.g., Bannerman v. City of Fall River,* 391 Mass. 328, 330–31, 461 N.E.2d 793 (1984); *Girard v. Town of Allenstown,* 121 N.H. 268, 272, 428 A.2d 488, 491 (1981). The long-term adverse effects of rent control are not readily apparent to the general public. Once in place, rent control is difficult to end because its imposition creates a large and strong constituency supporting its continuation.[11] Yet, as discussed more fully below, consistent with standard economic theory, rent control has resulted in a decline in the number of rental housing units and of poor, minority, and student tenants in other rent-controlled jurisdictions.

The fact that the adverse effects of rent control in Santa Monica have been repeated in other jurisdictions in other states supports granting certiorari in this case as this Court's determination will affect several large and economically vital jurisdictions that currently enforce rent control or are considering its imposition in the future. The extent to which rent control constitutes a regulatory taking is thus a matter of national concern that this Court has not previously considered[12]

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11 Particularly in times of high housing price inflation (regardless of general price stability), there is a strong popular demand for rent control. For example, in Massachusetts rent control was repealed by statute, Mass. G.L. ch. 40P, after a successful 1994 referendum campaign. Nevertheless, currently there is an effort to reimpose rent control through legislation would affect all properties that once benefitted from government housing subsidies and would gradually spread rent control, since the bill covers all apartments ever occupied by a Section 8 tenant. 1999 Mass. House Bill 1548 §§ 2 (A) (3), 5.

12 In *Yee, supra,* 483 U.S. at 537–38, this Court recognized the importance of and invited consideration of the regulatory taking question in an appropriate case.

and that should be addressed by this Court pursuant to Supreme Court Rule 10 (c).

Classic economic theory teaches that the effects of "hard" or "first-generation" rent control[13] include the following effects: an increase in tenant demand for cheap apartments, a reduction of supply of apartments, deterioration of rental housing stock, discouragement of new rental construction, inefficient distribution of rental housing resources,[14] side-payments, and selection by landlords of "easy" tenants. *See* N. GREGORY MANKIEW, *PRINCIPLES OF ECONOMICS* 115–17 (1998); JOSEPH E. STIGLITZ, *ECONOMICS* 114–16 (2d ed. 1993); Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306. As landlords under rent control must rent at the regulated rent, they can exercise their prejudices in tenant selection without paying an economic penalty, as they would in the free market. Therefore, for example, a landlord who would prefer to rent available apartments to quiet widows rather than to noisy students would not be forced to lower his rents to accommodate his selective tenant choices. *See id.*

So called second-generation rent controls, which "entail a complex set of optional provisions governing not only rents and rent-increases, but also conversion, maintenance, and landlord-tenant relations," were introduced in the 1970s.

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13 "'[F]irst-Generation' [rent control] programmes [sic] entail rent freezes, with intermittent upward adjustments in rents." Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 305.

14 "The proverbial example [of inefficient distribution of housing resources under rent control] is a poor widow who chooses to remain in the large unit in which she raised her children, while large young families have to settle for cramped quarters." Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306.

Arnott, *supra*, 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 305–306. The extent to which second-generation rent control mitigates the perverse effects of classic first-generation rent control depends on the particular provisions of the implementing regulations, *id.* at 307, and can best be reviewed by empiric analysis such as that proffered by SMB below.

It is not surprising that investors refrain from development of residential real estate in areas subject to rent control. Residential housing has historically had one of the lowest returns on investment of traditional investment vehicles, *Slimmer Pickings*, ECONOMIST, Mar. 23, 1996, at 78, even without the additional disincentive of rent control. Even with a second-generation style regulation exempting new construction from rent control, the existence of rent control considerably increases potential investors' fears that Santa Monica might decide at a future date to impose rent control on additional properties when their tenants became sufficiently politically active to demand the protections available to their neighbors.[15]

Thus, as predicted by the classic economic model, in Santa Monica rental housing stock decreased by nearly 5% in

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15 *See* Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 949 (1991) (threat of rent control hampered construction of new housing in New York); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 767 (1988) ("Even if new construction is exempt from the [rent control] statute, existing rent control laws give a loud and clear signal that old policies may be reversed so that future units may be subject to similar restrictions." (footnotes omitted)); Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHI.-KENT L. REV. 931, 943 (1991); R.S. Radford, *supra*, 21 SW. U. L. REV. at 1037–38 & n. 130 (New York City has twice implemented rent controls for previously exempt buildings).

the ten years from 1980 to 1990 while rental housing increased in comparable Southern California towns without rent control, App. E-3. It would appear that in Santa Monica landlords withdrew properties from the rental market by owner-occupancy or deterioration and replacement housing was not built. By increasing demand, *see* Radford, *supra,* 21 SW. L. REV. at 1039–40 & n. 136, and decreasing supply, *see supra,* note 15, rent control thus effectively creates the perception of a continuing emergency, which can only be alleviated by incentives to increase supply and to dampen demand, such as introduction of free market rents.

Similar trends were demonstrated from 1980 to 1990 in rent-controlled Cambridge and Brookline, Massachusetts. ROLF GOETZE, *RENT CONTROL: AFFORDABLE HOUSING FOR THE PRIVILEGED, NOT THE POOR* 8–11 (1994). Cambridge and Brookline rental housing stock decreased from 1980 to 1990, while rental housing stock in the ten largest non-rent-controlled Greater Boston towns increased. *Id.* ii, 7–8, 2-9 (1994).[16] Studies of New York City and other rent-controlled municipalities similarly indicate that rent control leads to deterioration of rent-controlled apartments and reduction of rental housing stock. MANKIEW, *supra,* at 115–17; STIGLITZ,

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16 After rent control ended in Cambridge in 1995, landlords began reinvesting in residential property maintenance. A recent study commissioned by the City of Cambridge found that new tenants of formerly rent-controlled ("decontrolled") apartments assessed their housing conditions considerably more favorably than did tenants remaining in decontrolled apartments. ATLANTIC MARKETING RESEARCH, *CAMBRIDGE RENTAL HOUSING STUDY: IMPACTS OF THE TERMINATION OF RENT CONTROL* 52 (1998). In the years immediately following the termination of rent control, permits for building improvements to decontrolled properties jumped by 68%, indicating significant deferred maintenance on such units. *Id.* at 79.

supra, at 114–16; Arnott, *supra*, at 309; Radford, *supra*, 21 Sw. U. L. REV. at 1034–36 & nn. 104–11.

The demographic data presented by SMB indicate that rent control has had the predicted classical effect on disadvantaged social groups in Santa Monica. App. E-3–4. *See* MANKIEW, *supra*, at 117; Arnott, *supra*, 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306. The number of poor, students, and minorities decreased because under rent control there was no adverse economic impact to landlords in renting to members of other groups perceived to be "easier" tenants. App. E-3–4. *See* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 769 & n. 118 (1988); R.S. Radford, *Why Rent Control is a Regulatory Taking?* 6 FORDHAM ENVTL. L.J. 755, 769–70 (1995); Radford, *supra*, 21 SW. U.L. REV. at 1047–48 & nn. 181–85. The poor and the elderly are particularly susceptible to the high search costs caused by excess demand for cheap rent-controlled apartments and inadequate incentives to increase supply. The poor cannot afford side payments and move more frequently, so that it is harder for them to maintain a position on a waitlist. Radford, *supra*, 21 SW. U.L. REV. at 1047 & nn. 178–80. The elderly may be daunted by the time and legwork necessary to locate an appropriate rent-controlled apartment. As older rent-controlled apartment dwellers gradually move out, they tend to be replaced by younger, more aggressive apartment seekers.

Demographic data taken from the United States Census for Cambridge and Brookline, Massachusetts, demonstrate trends similar to those apparent in Santa Monica. Based on 1990 Census data, there was considerable housing underutilization in rent-controlled Cambridge and Brookline, indicating that rent-controlled tenants chose to live alone or in smaller family units or to rent more space than they would have

in neighboring non-controlled towns. GOETZE, *supra*, at 8–9, 15–16. Families with children in Cambridge were significantly more likely to live in market-rate apartments than rent-controlled units. *Id.* Cambridge Election Commission data on occupation and birthdate and Census data indicate that individuals in their 20s, 30s, and 40s were more likely to live in rent-controlled apartments than those over 60, who were more likely to live in market-rate or publicly assisted units. *Id.* at 18–19, 2-14–15. Contrary to the intent of many rent control laws (including Santa Monica's), white collar employees and those in the skilled trades predominated in Cambridge rent-controlled housing while unskilled workers, students, housewives, and retirees were as likely or more likely to live in uncontrolled buildings. *Id.* at 16–17, 2-16–17. In 1990, rent-controlled tenants in Cambridge had yearly incomes averaging over $1000 higher than tenants in Cambridge market-rate apartments. *Id.* at 14–15.[17] Similarly, in 1990, fewer than 14% of tenants in rent-controlled housing were non-white, while 19% of tenants in market-rate apartments were non-white. *Id.* at 19. These findings—fewer elderly, minorities, and families in rent-controlled housing than in market-rate housing—parallel the predicted effects of rent control as a powerful force for gentrification in Santa Monica.

Not unsurprisingly, in a study commissioned by the City of Cambridge based on a 1997 survey of 1000 households, the

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17 Similarly, in New York City, a 1986 study for the Rent Stabilization Association indicated that wealthy white families received the greatest economic benefit from rent regulation while poor blacks and Hispanics (a large percentage of the total New York City population) received considerably less direct benefit from rent regulation. ARTHUR D. LITTLE, INC., *A TALE OF TWO CITIES* ES-4–5 (1986). *See* Richard Ault & Richard Saba, *The Economic Effects of Long-term Rent Control: The Case of New York City*, 3 J. REAL EST. FIN. & ECON. 25 (1990).

numbers of poor, minorities, and students increased in Cambridge *after* rent control was terminated in Massachusetts. ATLANTIC MARKETING RESEARCH, *CAMBRIDGE RENTAL HOUSING STUDY: IMPACTS OF THE TERMINATION OF RENT CONTROL* 34, 43–44 (1998). Despite the end of rent control, the socioeconomic profile of Cambridge became poorer. Significantly more wealthy households moved out after rent control was ended while moderate income and poor tenants replaced them in their decontrolled apartments. *Id.* For example, households with under $20,000 in yearly income increased by 5% while households with income over $80,000 decreased by 13% based on move-in/move-out data. *Id.*[18] This is consistent with the wealthy—who were receiving sizable subsidies under rent control—moving out to more appropriate owned housing or larger apartments after their subsidized controlled rents terminated and being replaced by lower income individuals willing to pay a reasonable rent for the now more readily available apartments.

SMB sought to present empirical evidence that demonstrates that the Santa Monica Rent Control Law in fact has the adverse effects predicted by economic theory (and these effects are confirmed by comparison with similar communities). A property owner should not be precluded from using that evidence to convince a court that the regulation's unintended effects outweigh or, as in this case, negate the intended benefits of the regulation under the standards articulated by this Court in *Nollan* and *Dolan*. "'[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law

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18 In addition, the Cambridge Survey indicated that, based on move-in/move-out data, the number of non-white tenants increased by 12% and the number of students increased by 18% after rent control was terminated. *Id.* at 43–44.

depends upon the truth of what is declared.'" *Baker, supra,* 369 U.S. at 214 (quoting *Chastleton, supra,* 264 U.S. 547–48).

CONCLUSION

For the reasons stated above, Santa Monica Beach, Ltd.'s petition for a writ of certiorari should be granted.

Respectfully submitted,

AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP;
AMERICAN SENIORS HOUSING ASSOCIATION;
COMMUNITY HOUSING IMPROVEMENT PROGRAM;
HUDSON COUNTY BOARD OF REALTORS;
HUDSON COUNTY TAXPAYERS ASSOCIATION;
ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION;
MAINE CONSERVATION RIGHTS INSTITUTE;
METROPOLITAN REAL ESTATE INVESTORS ASSOCIATION;
NATIONAL APARTMENT ASSOCIATION;
NATIONAL MULTI HOUSING COUNCIL;
NEW HAMPSHIRE PROPERTY OWNERS ASSOCIATION;
PROPERTY OWNING WOMEN;
PROPERTY RIGHTS FOUNDATION OF AMERICA;
RENT STABILIZATION ASSOCIATION; AND
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